No. 96-1766

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Supreme Court of the United States

October Term, 1996

HON. THOMAS R. PHILLIPS, HON. RAUL A. GONZALEZ, HON. JACK HIGHTOWER, HON. NATHAN L. HECHT, HON. LLOYD DOGGETT, HON. JOHN CORNYN, HON. BOB GAMMAGE, HON. CRAIG T. ENOCH, HON. ROSE SPECTOR, TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION, AND W. FRANK NEWTON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS, AND MICHAEL J. MAZZONE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Fifth Circuit err by holding that the Texas Equal Access to Justice Foundation, an entity created by the Texas Supreme Court to operate in a manner directed by the Rules of that Court, is an arm-of-the-state entitled to immunity under the Eleventh Amendment in a suit challenging the Order of the Texas Supreme Court that brought the Foundation into existence?

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STATEMENT OF THE CASE

This opposition is submitted by the Justices of the Supreme Court of Texas, the Texas Equal Access to Justice Foundation ("TEAJF") and W. Frank Newton in his official capacity as Chairman of the Texas Equal Access to Justice Foundation (collectively "Petitioners") in response to the Cross-Petition for a Writ of Certiorari filed by the Washington Legal Foundation and other cross petitioners (collectively "Cross-Petitioners").

The case is a challenge to the existence of the Texas IOLTA ("Interest on Lawyer's Trust Account") program established by order of the Texas Supreme Court in 1984. The facts of the underlying suit have been thoroughly briefed by the parties in the Petition for a Writ of Certiorari and in the Cross-Petition. *See* Cross-Pet. at 3-8. The Cross-Petition seeks review of the specific language employed in the Fifth Circuit's Eleventh Amendment analysis,[1] claiming a "conflict" exists among the circuit courts.

This "conflict," however, involves nothing more than a once-existing academic debate (since resolved by this Court) over the relative significance of factors in the "arm-of-the-state" analysis. In truth, the Cross-Petition merely clouds the issues presented in the original Petition for a Writ of Certiorari related to the Fifth Amendment's Takings Clause. Indeed, the attendant briefing on the Eleventh Amendment issue would be cumbersome and unnecessary, as no actual "conflict" exists.

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[1] The Cross-Petition is directed only at the Fifth Circuit's holding that TEAJF is entitled to immunity. There is no challenge to the immunity of W. Frank Newton.

From the outset, the parties have focused attention on the constitutional attack on the existence of the Texas IOLTA program. At the district court, and again at the Fifth Circuit, the Eleventh Amendment was of only minor concern. Both courts found that the Eleventh Amendment immunized TEAJF from suit in federal court without its consent. Specifically, in the district court, Cross-Petitioners challenged the Texas Supreme Court and its Rule bringing TEAJF into existence. The district court held that TEAJF acts as an agent of the Texas Supreme Court and occupies the position of a public agency for purposes of the Eleventh Amendment. Pet. App. 38a. Cross-Petitioners had argued that TEAJF was not an arm-of-the-state absent evidence that the state treasury would be liable for money judgments entered against TEAJF.

While the Eleventh Amendment issue was again raised at the Fifth Circuit, that court commented on the "lackadaisical approach" of the parties in pursuing the issue. In short order, the court held that Eleventh Amendment immunity clearly applied. The Cross-Petition makes much of the language and analysis employed by the Fifth Circuit in reaching this holding, claiming that the succinct opinion is somehow in "conflict" with the analysis employed by other courts of appeals. It is on the basis of this contrived "conflict" that Cross-Petitioners seek review in this Court.

REASONS FOR DENYING THE WRIT

INTRODUCTION AND SUMMARY

In their Conditional Cross-Petition, Washington Legal Foundation and the other Cross-Petitioners (hereafter collectively "Cross-Petitioners") urge the Court to resolve "the conflict among the circuits regarding how to evaluate claims that an entity is an 'arm of the state' entitled to Eleventh Amendment immunity." (Cross-Pet. at 8). In fact, there is no conflict. The Cross-Petitioners have strained to create the impression that a conflict exists by finely parsing the opinion in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 115 S. Ct. 394 (1994), which involved a bi-state entity, and by selectively focusing on nuances in the way the lower courts have applied *Hess's* language in the more typical situation involving only a single state.

At most, the Cross-Petition addresses supposed "confusion," outside the bi-state entity context, over the relative "importance" of one of the "factors" cited by the Court in *Hess*.[2] This academic debate does not amount to a conflict, was not addressed by the court or the parties in this case and, in any event, appears already to have been resolved by this Court. *Regents of Univ. of Cal. v. Doe*, ___ U.S. ___ , 117 S. Ct. 900, 904-05 (1997) (applying state treasury factor of *Hess* to single-state entity). The argument Cross-Petitioners seek to advance on the tentative

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[2] In *Hess*, the Court stressed "Bi-state entities occupy a significantly different position in our federal system than do the States themselves," and ultimately found that no immunity existed. 115 S. Ct. at 400. The holding is clear and has not created any "confusion" among the lower courts.

strength of this "conflict" – that immunity cannot exist unless a judgment would be satisfied directly from the state treasury – is one that has *not* "confused" the lower courts or created any conflict, real or imagined. Indeed, it was rejected by this Court in *Seminole Tribe* when it held two Terms ago that "The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a state treasury.' " *Seminole Tribe of Fla. v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996). Granting the Cross-Petition would do little more than unnecessarily expand the issues before the Court in this case.

1. The Fifth Circuit Did Not Reject *Hess*

Far from announcing some radical departure from any rule laid down in *Hess*, even a cursory examination of the decision below confirms, as the Cross-Petitioners concede (Cross-Pet. at 9), that the Fifth Circuit never even cited *Hess* or had any occasion to depart from its holding. Cross-Petitioners, in artfully-crafted language, suggest that the Fifth Circuit has "taken the position" that *Hess* applies only to bi-state entities and has "*no relevance*" to the immunity of entities created by a single state. *Id.* (emphasis added).

Cross-Petitioners cite an earlier Fifth Circuit decision, *Pillsbury Co. v. Port of Corpus Christi Authority*, where the court held that *Hess* had not overruled an earlier opinion in which the Port Authority of Houston was found to be entitled to Eleventh Amendment immunity. 66 F.3d 103, 104 (5th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1705 (1996). The Fifth Circuit panel went on to discuss the

holding of *Hess* in *dicta*: "[w]e view *Hess* as a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute." *Id.* This *dicta* is hardly surprising given *Hess's* own recognition that "Bi-state entities occupy a significantly different position in our federal system than do the States themselves." 115 S. Ct. at 400. Regardless, nowhere in this decision (or any other opinion) did the Fifth Circuit ever suggest (as Cross-Petitioners now claim) that any of the *"factors"* driving the *holding* in *Hess* were "irrelevant."[3] In fact, just the opposite is true. The Fifth Circuit has repeatedly applied the state-treasury factor, even where the entity in question was the creation of a single state. *Green v. State Bar of Tex.*, 27 F.3d 1083, 1087 (5th Cir. 1994); *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991) (listing state-treasury factor as "most significant").

Exactly where or how the Fifth Circuit in this case has "taken the position" that any factor employed in *Hess* is "irrelevant" in the single-state (or any other) context is a mystery. *See* Pet. App. 1a-19a. Indeed, no mention of such a distinction is even made. Instead, the Fifth Circuit makes short work of the argument that an agency created by a state supreme court to effectuate a court ruling is not entitled to immunity.[4] Though it makes no mention of

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[3] This Court's denial of certiorari despite the explicit *dicta* concerning *Hess* (absent here) of course does not carry any precedential effect and should not be taken as an indication that the Court found no need to clarify any deficiency in "language" either in *Hess* or this opinion.

[4] In fact, the Fifth Circuit makes note of the parties' "lackadaisical approach" to the Eleventh Amendment argument. Perhaps the Court's perception was driven in part by

Hess, it certainly suggests no confusion over the proper analysis.

Thus, at most, the Cross-Petition seeks to present the question of a supposed conflict among the other circuits over the relative importance of language in *Hess* as it relates to state agencies. As explained below, no such conflict exists. Moreover, to the extent the language in *Hess* has created "confusion" on this issue, this Court has already resolved it.

2. Neither the Fifth Circuit's Holding Nor Those Cited By the Cross-Petitioners are in Conflict With Any Other Decision

The Fifth Circuit's *holding* below is consistent with every one of the few published decisions in which a plaintiff has attempted to argue that officials appointed by a state supreme court to effectuate a court mandate should not be considered an arm of the state. *E.g.*, *Thiel v. State Bar of Wis.*, 94 F.3d 399, 403 (7th Cir. 1996); *Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir. 1986) (focusing on impact on public funds); *O'Connor v. State Bar of Nev.*, 686 F.2d 749, 750 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982); *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (discussing relationship between Arizona Supreme Court and Bar). Of course, the Cross-Petition does not focus on the actual holdings of this Court or of

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the obvious inconsistency of Cross-Petitioners' argument both in this Court and below. On the one hand, Cross-Petitioners vigorously propound a Fifth Amendment case alleging action under color of state law. On the other, they attempt to suggest an absence of state action as it applies to the Eleventh Amendment.

the circuits. Rather, the Cross-Petition stresses the language and analyses in this Court's *Hess* decision and in a handful of decisions from other circuits. Most specifically, Cross-Petitioners stress the relative importance of one factor in this Court's suggested multi-pronged Eleventh Amendment test: whether a judgment would be paid from a state's treasury.

The Cross-Petition claims that the lower federal courts and commentators have been "confused" about whether this factor is still the most important where, unlike the agency at issue in *Hess*, the defendant is related to a single state. Nowhere do Cross-Petitioners suggest that this debate was even addressed in this case. In fact, all of the decisions cited by the Cross-Petitioners in support of the supposed "conflict" with the Fifth Circuit's "position" agree that the decision in *Hess* is germane.[5]

Even in the context of a single-state entity, no conflict exists among the circuits as to the applicability of the factors enunciated in *Hess* and other cases from this Court[6] to the Eleventh Amendment analysis. Contrary to Cross-Petitioners' assertions, the analyses of other circuits following *Hess* are not inconsistent with that of the

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[5] One panel of the Seventh Circuit did note that this factor may have played a greater role in *Hess*, because the entity there involved was a joint creation of several states that generated income (and satisfied debts) outside a single state's treasury. *See Thiel v. State Bar of Wis.*, 94 F.3d 399, 401 (7th Cir. 1996).

[6] *E.g., Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 1171 (1979) (analyzing factors relevant to the Eleventh Amendment inquiry in the bi-state context).

Fifth Circuit. Each considers a variety of factors.[7] While Cross-Petitioners would argue otherwise, even after *Hess*, this Court itself has already noted that the payment of judgments out of the state treasury is not the sole factor in an Eleventh Amendment analysis. *Seminole Tribe of Fla. v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996). The Fifth Circuit's analysis is simply less detailed than those found in other circuits. Thus, while there may be some confusion in Eleventh Amendment jurisprudence as a general matter, it would seem that only the Cross-Petitioners are unable to understand *Hess*.[8]

This raises what should be a rather obvious question: how would adding the question of whether the state treasury factor is the "most" important to this case aid in its disposition? There is no indication that the Fifth Circuit disregarded this factor as "an indicator of the relationship between the state and its creation." *Regents of*

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[7] *E.g., Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 481 (1996); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1144-45 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 340 (1995); *Gray v. Laws*, 51 F.3d 426, 431-33 (4th Cir. 1995); *Hadley v. North Arkansas Community Technical College*, 76 F.3d 1437, 1438-39 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1080 (1997); *Sonnenfeld v. City & County of Denver*, 100 F.3d 744, 749 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3572 (U.S. May 19, 1997) (No. 96-1296).

[8] The one student note Cross-Petitioners cite in support of the notion that the appeals courts are unable to devise a coherent approach to these questions was written two years before this Court's decision in *Hess* attempted to lend guidance. Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243 (1992).

Univ. of Cal. v. Doe, ___ U.S. ___, 117 S. Ct. 900, 904 (1997). Instead, Cross-Petitioners seek to present a new argument – that immunity is not available if the judgment would be paid by an entity related to the state out of operating funds, regardless of whether the state treasury would ultimately be called on to replace them.

3. Cross-Petitioners' Actual Argument Is Not Worthy of Review

For reasons that are not apparent, Cross-Petitioners would narrow the inquiry to whether *Hess* would require denial of immunity (apparently with respect to single- *or* bi-state entities) unless a judgment would be paid directly from the state treasury. They do not even suggest that there has been any conflict in the lower courts over this question or that it was even presented in this case. They cite no authority from this Court or any other in support of such an absurd result. Yet they maintain that their contrived "conflict" requires resolution in this case. The position of the Cross-Petitioners is simply illogical and wrong. This Court has already refused to give the so-called "state-treasury factor" the controlling weight that Cross-Petitioners would urge if the Cross-Petition were granted. *Seminole Tribe of Fla. v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1124 (1996) ("The Eleventh Amendment does not exist solely in order to 'prevent federal court judgments that must be paid out of a state's treasury' ") (quoting *Hess*). In fact, even *Hess* suggests that where, as here, the continued existence of the entity would be

threatened by the litigation itself were it not for additional financial backing of the state, the judgment perforce expends itself against the state's treasury. *Hess*, 115 S. Ct. at 405 (citing *Morris v. Washington Metro. Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986)).

Further, it is difficult to imagine how this case would be an appropriate vehicle for addressing this argument. While Cross-Petitioners apparently have some philosophical motivation, they have no cognizable interest at stake. Even they concede (Cross-Pet. at 20) that there are just a few hundred dollars at stake. In fact, they have no money at stake; their funds could have earned no net interest at all were it not for the aggregation in an IOLTA account. This Court has traditionally refused to involve itself (for a host of salient reasons) in cases in which the parties do not have any real injury or other concrete motivation to pursue the issues. Legal questions presented to the Court should "be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986).

4. This Court has Already Applied the *Hess* Factors to Single-State Entities

To the extent the Cross-Petition and commentators[9] truly seek clarification of the role the state treasury "factor" plays in the context of single-state entities, that question was

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[9] *E.g.*, Carlos M. Vazquez, *What is Eleventh Amendment Immunity*, 106 Yale L. J. 1683, 1806 (1997).

answered rather emphatically in *Regents of Univ. of Cal. v. Doe*, ___ U.S. ___, 117 S. Ct. 900, 904-05 (1997). In that case, the Ninth Circuit had denied immunity to the University, because a federal agency had agreed to indemnify it. This Court applied *Hess* and concluded that the University remained immune, reaffirming that it is the *potential effect* of a judgment[10] that is significant in determining the relationship between the entity and the state.

In sum, the Cross-Petitioners' "conflict" is illusory and insubstantial. Further, the rule Cross-Petitioners wish the Court to consider (1) has nothing whatever to do with this case or the supposed "conflict" they advance and (2) finds no support in this Court or any other. This Court should adhere to its usual role of resolving actual conflicts and issues presented in the case under review. *Holly Farms Corp. v. NLRB*, ___ U.S. ___, 116 S. Ct. 1396, 1402 n.7 (1996). Moreover, the Court should refrain from review of the particular language or analyses employed by the lower courts. Although, Cross-Petitioners make much of this "conflicting" language, it has long been true that "this Court reviews judgments, not opinions." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

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[10] Hence, one would assume that a payment out of the budget of the University would have required replacement by the state.

CONCLUSION

The Cross-Petition does not identify any conflicting holdings of the lower courts. Neither does it suggest any conflict between the decision below and any other decision. Instead, it suggests that there has been a conflict in language and analyses in lower court opinions regarding the state-treasury factor as applied to single-state entities in Eleventh Amendment jurisprudence. As even this pedantic "conflict" has been resolved (and in any event played no role below), it is not in the interest of the Court or the parties to grant the Cross-Petition. The Cross-Petition should therefore be denied.

Respectfully Submitted,

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